United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 31, 2000

TO : Richard L. Ahearn, Regional Director

Region 9

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Cannelton Industries, Inc.

Case No. 9-CA-37130 512-5009

512-5030-8000 625-1967-5000

This Bill Johnson's¹ case was submitted for advice regarding whether the Employer violated Section 8(a)(1) by maintaining lawsuits within the Section 10(b) period against employee-grievants seeking to vacate contractual arbitration awards and by seeking discovery from the employees pursuant to its suits.

FACTS

Respondent Cannelton Industries, Inc. ("Employer" or "Cannelton") and Charging Party United Mine Workers of America, District 17 ("Union") were parties to the National Bituminous Coal Wage Agreement of 1993. On October 31, 1998, arbitrator Norman R. Harlan granted a grievance filed by employee Rick Miles complaining that the Employer assigned overtime work to him out of seniority. On January 28, 1999, the Employer filed suit in federal district court for the Southern District of West Virginia seeking to vacate the arbitrator's award. The Employer named both the Union and Miles as defendants.

Miles subsequently moved the court to dismiss him from the lawsuit, asserting that he was not a necessary party to a dispute concerning the interpretation of a collective-bargaining agreement. Cannelton formally opposed the motion for dismissal, responding that Miles was a necessary party because he had a monetary interest in the outcome of the suit which could diverge from those of the Union. Nonetheless, Cannelton asserted that it would have no objection to dismissal "if the union takes responsibility for the interests of Rick Miles, and if, in his absence, the Court can resolve the ultimate issues in this case"

¹ Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

On April 19, 1999, the Court granted Miles' motion for dismissal.² Citing an unpublished in-district decision holding that an employee-grievant has no standing to bring arbitral review actions under Section 301,³ the court held that Miles was not a proper party to a judicial challenge to an arbitral award because he was neither signatory to the collective-bargaining agreement nor a party to the underlying arbitration proceeding. After Miles was dismissed, the Employer requested through discovery that Miles produce documents related to the arbitration proceeding. Miles complied with that request.

In a separate matter, Local Union president Jim Wills, a Cannelton employee, filed a grievance on behalf of himself and 48 other, unnamed employees alleging that Cannelton had violated the collective-bargaining agreement by contracting out unit work. In a March 31, 1997 decision, arbitrator Samuel Spencer Stone sustained the grievance and, by supplemental decision dated June 15, 1998, he ordered the Employer to pay Wills \$11,152 as compensation for the loss of work. Arbitrator Stone declined to determine the precise identities of the employees affected by the Employer's subcontracting decision in light of the parties' failure to raise the issue at hearing.

On September 10, 1998, the Employer filed suit in the same federal district court to vacate the Wills arbitration award. The sole issue presented was whether the arbitrator exceeded his authority by awarding Wills all the compensation due to the entire class of affected employees. As with the Miles case, Cannelton named both the Union as well as Jim Wills as defendants. In response, Wills similarly moved the court to dismiss him as a defendant. The Employer opposed the motion, claiming, as in the Miles case, that Wills' separate, monetary interest in the litigation's outcome made him a necessary party under Federal rules. As with Miles, however, Cannelton stated that it would have no objection to dismissal if "the union takes responsibility for the interests of the individual members, and if, in the absence of Jim Wills, et al., the Court can resolve the ultimate issues in this case."

² Cannelton Industries, Inc. v. District 17, United Mine Workers of America, et al., 46 F. Supp. 2d 500 (S.D.W.Va. 1999).

 $^{^3}$ Smoot v. Eagle Energy, Inc., Case 2:98-0153, slip op. at 2 (S.D.W.Va. May 13, 1998) (unpublished).

On September 30, 1999, the court granted Wills' motion to dismiss. A Relying on $\underline{\text{Smoot}}$ as well as the recent decision in the $\underline{\text{Miles}}$ case, the court held that an employee-grievant is not a proper defendant in an action to vacate an arbitration award in light of the "well-settled" rule that union members generally are prohibited from enforcing an arbitration award.

Despite his removal as a party, the Employer has continued to seek discovery against Wills in the ongoing lawsuit against the Union. Cannelton claims therein that compensation paid directly to Wills would violate Section 302 of the Labor Management Relations Act which prohibits employers, in certain instances, from paying money to employee representatives, union officers or labor organizations. Although Section 302(c)(3) allows payments to union officials which derive from meritorious arbitral awards, Cannelton claims that Wills has failed to properly disburse arbitral compensation to affected employees in the past. Thus, the Employer sought to discover documents from Wills which would support their claims, including, inter alia, documents relating to Wills' fiduciary duties in his capacity as a Union officer, the Union's internal procedures to determine the identity of proper recipients of monetary awards, the means by which the Union notifies recipients of their successful contractual claims, and all records of cash disbursements to Union officials from prior arbitration awards.⁵

The Union filed repeated attempts to quash the discovery requests as irrelevant, burdensome, ambiguous and overbroad. By successive orders, the final of which was entered on September 30, 1999, the court enforced the discovery requests against Wills in their entirety. The court held that the documents which the Employer seeks are relevant to its argument that the arbitrator erred by

⁴ Different judges presided over the Wills and Miles cases.

⁵ The Employer also sought records from Wills to support his claim that he is a proper member of the disputed class of employees, i.e., that he is fit to perform the work which he allegedly lost as a result of the subcontracting decision. Cannelton further subpoenaed personal financial documents, such as copies of Wills' bank records and income tax returns, which would arguably indicate that Wills had previously failed to properly disburse monies from arbitral awards.

awarding compensation to Wills in violation of Section 302. Wills subsequently complied with the document production, but has not yet been deposed.

ACTION

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining meritless, baseless and retaliatory lawsuits against the individual employees. We further conclude, however, that the Employer did not unlawfully seek discovery from Wills and Miles which was relevant to its remaining claims against the Union.

Under the Supreme Court's analysis in $\frac{\text{Bill Johnson's}}{\text{Johnson's}}$, the Board cannot halt the prosecution of a lawsuit unless two conditions are met: (1) the lawsuit lacks a reasonable basis in fact or law, and (2) the plaintiff filed the suit to retaliate against protected activity.

Here, the first prong of this two-part test is governed by the Board's decision in <u>Alberici Construction</u>, where it was noted that:

[t]he Board has consistently interpreted Bill Johnson's Restaurants to hold that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit.

The courts concluded that Cannelton improperly named Wills and Miles as defendants to actions for review of contractual arbitral awards and they have dismissed the claims against them. Although the Employer may retain a theoretical right of appeal as to the dismissals of individual defendants, 8 Cannelton told the courts in writing

⁶ <u>Bill Johnson's Restaurants, Inc.</u>, 461 U.S. at 748-749.

⁷ Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992) (citations omitted), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994). See also <u>Bill</u> Johnson's Restaurants, 461 U.S. at 747.

⁸ See Rule 54(b) of the Federal Rules of Civil Procedure (order adjusting fewer than all of the parties is not final unless expressly directed).

in both cases that it had no objection to the dismissals so long as the Union would continue to represent the employees' interests. We conclude that under the facts of this case, the courts have for all intents and purposes entered a final judgment which the Employer has indicated it will accept rendering the suits against the individuals meritless. The Employer's agreement to the dismissals of the claims against Wills and Miles is analogous to a withdrawal of the pertinent complaint allegations, which further substantiates the meritless prong. 9

We further conclude that the suits against the employees were baseless <u>ab initio</u>. In <u>Smoot v. Eagle Energy, Inc.</u>, the Southern <u>District</u> of West Virginia dismissed an employee's breach of contract claim against his employer in reliance upon the generally recognized rule that individual employees have no standing to challenge, modify or confirm arbitration awards. We are unaware of any contrary judicial precedent which would bestow standing on an employee-grievant to enforce an arbitral award, absent a union's express agreement or unfair representation. Thus, we conclude that an employee is not a necessary or proper defendant to a suit to vacate an arbitral award where he has no standing to enforce such a judgment, rendering a suit against an individual employee baseless.

The Employer's reliance on a Seventh Circuit decision in $\underline{F.W.}$ Woolworth v. Miscellaneous Warehousemen's Union \underline{Local} 781^{12} is misplaced. In that case, the court held that employees may intervene, in an employer suit to vacate an arbitration award, to appeal a grant of summary judgment

⁹ <u>Bill Johnson's Restaurants v. NLRB</u>, 461 U.S. at 747 (once respondent withdraws suit, Board may proceed to retaliatory prong).

Smoot, slip op. at 2. Accord: <u>Katir v. Columbia</u>
University, 15 F.3d 23, 24-25 (2d Cir. 1994).

¹¹ See Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239 (7th Cir. 1990) (individual employees have no standing to challenge, confirm, or modify arbitral awards, absent either union inaction and acquiescence in employees' action or breach of union's duty of fair representation to employees).

^{12 629} F.2d 1204 (1980), cert. denied 451 U.S. 937 (1981).

vacating the award where the union both chose not to appeal the judgment and acquiesced in the employee's defense of the arbitral award. The court specifically stated that, under substantive labor law, the employees could not have intervened earlier until summary judgment was granted and until the union decided not to appeal, because the employees were represented by an existing party. 14

Here, however, there has never been any question that the Union has and will continue to defend the arbitral awards before the court. From the very beginning, the Union has vigorously responded to the Employer's lawsuits, discovery requests and related proceedings. Thus, to the extent the Woolworth case has any force in the Southern District of West Virginia, the Seventh Circuit's narrow exception to the accepted rules of standing in this area is inapposite to the facts of these cases. In fact, Woolworth's statement that individual employees would not even be allowed to intervene to defend an arbitral award, until certain events not present here occurred, confirms that individual employees are not necessary parties in suits concerning arbitral awards.

The second, retaliatory prong under <u>Bill Johnson's</u> is satisfied here as well. The Employer acknowledges that it filed suit against the employees solely because they filed the grievances which resulted in the disputed arbitral awards. Thus, by filing suit, the Employer attacked Miles and Wills for engaging in protected, grievance filing activities. Although the Employer merely sought review of the arbitral awards without demanding a specific remedy against the employees, the Board considers lawsuits directed against protected activity to be inherently retaliatory as they "necessarily tend to discourage similar protected activity." In addition, the dismissal of the

¹³ Id. at 1213.

¹⁴ Ibid.

¹⁵ See <u>BE & K Construction</u>, 329 NLRB No. 68, slip op. at 10 (lawsuit attacking grievance filing, retaliatory); <u>Geske & Sons, Inc.</u>, 317 NLRB 28, 58 (1995), enfd. 103 F.3d 1366 (7th Cir. 1997) (retaliation evidenced by subject matter of the lawsuit, i.e., protected activity).

BE & K Construction, 329 NLRB No. 68, slip op. at 10. See also <u>Bill Johnson's v. NLRB</u>, 461 U.S. at 740 (noting the "chilling effect" of an unmeritorious lawsuit filed against an individual employee).

complaint allegations against the employees itself is further evidence of the retaliatory nature of the filing. Accordingly, we conclude that Cannelton violated Section 8(a)(1) by maintaining unmeritorious and retaliatory suits against Miles and Wills.

However, we further conclude that the Employer did not unlawfully seek discovery against Wills and Miles in its ongoing lawsuits against the Union. Parties to a lawsuit have the right to depose the opposing party regarding matters related to an unfair labor practice hearing. In addition, under the Federal Rules of Civil Procedure, the deposing party is entitled to the disclosure of all relevant material, including matters touching on protected, concerted activities. And in Maritz Communication Co., supra, the Board held that where questions propounded during a deposition in a civil suit are arguably relevant under the Federal Rules, an employer does not violate Section 8(a)(1) by questioning the charging party regarding his/her relationship to a union, even if Johnnie's Poultry safeguards are not given.

In the suit involving Wills, the court concluded on a number of occasions that the Employer's line of questioning was relevant to its allegations that the Union, and Wills specifically, had mishandled monetary awards in the past. It is immaterial that Wills had already been dismissed as a party defendant since Cannelton sought discovery from him pursuant to its ongoing lawsuit against the Union. Further, Wills' attorneys had every opportunity to protect their client's interests, and they did so by repeatedly seeking to quash the discovery. Hence, under Maritz, the fact that the Johnnie's Poultry safeguards were not given is not sufficient to establish a violation of Section 8(a)(1).²⁰ Similarly, the documents sought from and

 $^{^{17}}$ Bill Johnson's Restaurant v. NLRB, 461 U.S at 748-49; Maritz Communications Company, 274 NLRB 200, 201 (1985).

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, the right to inquire into matters relevant to the subject matter of the pending action has been broadly construed "to encompass any matter that could bear on any issue that is or may be in the case" Oppenheimer Fund \underline{v} . Sanders, 437 U.S. 340, 351 (1977).

¹⁹ Johnnie's Poultry Co., 146 NLRB 770 (1966).

Discovery concerning Wills' fitness to perform the work involved in the award and the demands for his personal

produced by Miles were relevant to the Employer's suit to vacate that arbitral award, and did not establish a Section 8(a)(1) violation.

[FOIA Exemption 5

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[FOIA Exemption 5, cont'd.

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financial records do not touch upon protected, concerted activities, and thus are not relevant to a Section 8(a)(1) analysis.

²¹ [FOIA Exemption 5

[FOIA Exemption 5, cont'd.

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B.J.K.